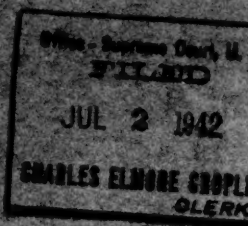

No. 120

In the Supreme Court of the United States

OCTOBER TERM, 1942

BEN BIBBERG & CO., INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 21–25) is not officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 33–36) is reported at 126 F. (2d) 412.

JURISDICTION

The decision of the Board of Tax Appeals was ordered affirmed on March 7, 1942 (R. 33–36), but no judgment was then entered. A petition for rehearing was denied on March 27, 1942 (R. 45), and

the judgment of the Circuit Court of Appeals was entered on that day (R. 46). A second petition for rehearing was denied on May 23, 1942 (R. 57). The petition for a writ of certiorari was filed June 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner, a dealer in cotton goods, received reimbursements in 1936 from its vendors on account of processing taxes which had been included in the price of goods purchased by it in 1935. The amount of those taxes had already been reflected to petitioner's advantage in its income tax returns for 1935, and the question presented is whether the Commissioner erred in treating the reimbursements as income for 1936.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

Petitioner brought this suit in the Board of Tax Appeals to obtain a redetermination of a deficiency in income tax for 1936 which with penalty amounted to $3,381.77. It also sought a refund in taxes for that year in the amount of $954.60 (R. 2–17). The Board found the following facts:

Petitioner is a wholesaler and jobber of cotton goods. Its general practice is to obtain orders

from its customers for specific merchandise and then place the orders with well-known mills. When these mills are ready to ship the goods, they ship them directly to the customers for the account of petitioner. The mill or other supplier sends an invoice to petitioner, and petitioner simultaneously invoices its customer with the goods in question. In some instances petitioner fills orders from a small inventory kept on hand (R. 22).

In the latter part of 1935, members of the cotton industry believed that the Agricultural Adjustment Act would be invalidated by the Supreme Court. Petitioner and other firms accordingly included in their purchase contracts clauses to the effect that if the Act were invalidated, the amount of processing taxes included in the purchase price of the cotton involved would be refunded or credited to them by their vendors (R. 22).

After this Court held the Agricultural Adjustment Act unconstitutional on January 6, 1936, the vendors who had agreed to include the above-mentioned clause in petitioner's purchase contracts promptly issued purchase allowances or credits to petitioner or, in some instances, made cash refunds. In all, during 1936 petitioner received from its vendors credits or other reimbursements in the sum of $19,763.13. This represented the amount of processing taxes charged to petitioner on goods which it purchased in 1935. With certain small exceptions, petitioner sold all these goods before December 31, 1935 (R. 22–23).

Petitioner kept its books on the accrual (and calendar year) basis. In its return for 1935 it included the $19,763.13 in processing taxes as part of the cost of the goods sold by it. In its return for 1936, which it did not file until January 28, 1938, it reported $7,729.45 of the $19,763.13 as income. The balance of $12,033.68, which it did not report in its return, represented sums covered by credit memoranda dated in 1936 which it had executed to some of its vendees for processing taxes included in the purchase price charged them. But on March 15, 1937, it had cancelled all of the credit memoranda. No reimbursement of the $12,033.68 was ever made by petitioner to its vendees, nor did petitioner have any contracts with its vendees to reimburse them for any processing taxes which petitioner might have passed on to them. Its books for the year 1935 contained no accounts indicating any amount due from its vendors for refund of processing taxes or reflecting any liability to its vendees for the taxes (R. 23–24).

By letter dated January 3, 1940, petitioner was notified of deficiencies in its tax for 1936. The Commissioner determined that petitioner realized income in 1936 on the full amount of the reimbursements received by it in that year and that it was liable for the prescribed penalty for failure to have filed its 1936 return on time (R. 10–13, 22). The Board sustained his determination and found that the deficiencies properly were assessed (R. 22–26). The Circuit Court of Appeals affirmed (R. 36, 46).

Thereafter, the court denied two petitions for rehearing in which petitioner alleged that prior to the date of expiration of the statutory period within which its 1935 tax might have been adjusted, it had notified the Commissioner of the reimbursements and had offered to have them added to its taxable income for 1935, when lower rates were in effect (R. 37–57).

ARGUMENT

1. Petitioner does not dispute (Pet. 5, 7) that the Commissioner may treat reimbursements such as those here involved as income in the year received in cases where the expiration of the statutory period of limitation precludes adjustment of the tax for the earlier year. See *Houbigant, Inc.* v. *Commissioner,* 31 B. T. A. 954, affirmed 80 F. (2d) 1012, certiorari denied, 298 U. S. 669; *Nash* v. *Commissioner,* 88 F. (2d) 477 (C. C. A. 7), certiorari denied, 301 U. S. 700. But it contends (Pet. 5, 6–9) that if the Commissioner is afforded adequate opportunity to make the adjustment within the period, he should be required to do so and should not have the alternative of treating the reimbursements as income in the year received. It asserts (Pet. 5) that in the instant case it gave the Commissioner several such opportunities to reassess its 1935 tax.

This assertion is unsupported by any evidence in the record (see R. 39). As appears from the record references cited by petitioner (R. 40, 42–43), it is based only on allegations contained in the petitions

for rehearing and on an affidavit filed by petitioner in support thereof in the court below.[1] The court below declined to decide whether the Commissioner would have been required to make an adjustment for 1935 if petitioner had notified him of the reimbursements as soon as it received them, pointing out that petitioner did not give any such prompt notice but, on the contrary, reported a portion of the reimbursements as income in its return for 1936 (R. 36). In view of these circumstances and of the fact that the burden of proof was on petitioner, the case does not present the question urged in the petition.

2. The decision of the court below does not conflict with *Inland Products Co.* v. *Blair, Commissioner,* 31 F. (2d) 867 (C. C. A. 4), or *Leach* v. *Commissioner,* 50 F. (2d) 371 (C. C. A. 1). The issue in each of those cases was whether the Commissioner had erred in adjusting the tax for the

[1] The affidavit (R. 42–44, 54–56) is to the effect that on December 14, 1938, petitioner protested in writing the Commissioner's proposed assessment of a deficiency tax for 1936 on the ground that the $12,033.68 in reimbursements not reported by it in its return for 1936 should be charged as income for 1935. The statutory period of limitation for adjusting the 1935 tax presumably expired subsequent to December 14, 1938, but precisely when is uncertain since the record does not contain petitioner's return for 1935 or disclose the date when it was filed. Under Section 275 (a) and (c) of the Revenue Act of 1934 (48 Stat. 680) the statutory period expired three years after the date of filing the return unless an amount of gross income equal to more than 25% of the total reported was omitted, in which case the period was five years.

earlier year, and neither court passed on the question whether he had the alternative of treating the refunds involved as income for the year of receipt. In the instant case the court below agreed (R. 34–36) that the Commissioner properly might have adjusted the tax for 1935. It held only that in the circumstances he was not required to do so.

3. Petitioner suggests (Pet. 8–11) that under correct accrual principles the reimbursements constituted income for 1935. During that year, however, petitioner had only a contractual right which was expressly contingent upon whether the Agricultural Adjustment Act would be declared unconstitutional (R. 19, 22, 24–25). The contingency did not occur until 1936. Accordingly, not until then did petitioner's right to the reimbursements become fixed and accruable. *United States* v. *Anderson*, 269 U. S. 422, 441; *Lucas* v. *American Code Co.*, 280 U. S. 445; *North American Oil* v. *Burnet*, 286 U. S. 417; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88. There are no decisions to the effect that petitioner properly might have accrued the amount of the reimbursements on its books for 1935 and it did not attempt to do so (*supra*, p. 4.)[2]

[2] *Sanford Cotton Mills, Inc.* v. *Commissioner*, 42 B. T. A. 190, and other similar decisions of the Board of Tax Appeals relied on by petitioner (Pet. 8–9) do not conflict with the instant decision. Those cases involved taxpayers in the situation of petitioner's vendors whose liabilities in the year in which they were allowed deductions were fixed and unconditional in that the amounts involved necessarily were required to be paid out by them either as taxes to the Government or to their vendees pursuant to contract.

The Government has petitioned for certiorari in *Helvering* v. *Estate of David Davies,* No. 118, 1942 Term, but the granting of the petition in that case does not require similar action here. There, the taxpayer sought to deduct in 1935 processing taxes which he never paid and which he was then contesting; and the Government is there contending that the accrual system of accounting does not permit the accrual of items of deduction which the taxpayer is contesting. Here, on the other hand, the petitioner actually paid the amounts in question in 1935, they were properly reflected in its returns for that year, and the question is merely whether the actual reimbursements in 1936 constitute income for 1936.

CONCLUSION

There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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JULY, 1942.